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Michael C. Dorf
Columbia Law School

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ABORTION RIGHTS

Michael C. Dorf[*]

Let me begin with a brief background for any of you who have been living in a cave for the last thirty-four years. In 1973, the Supreme Court, in *Roe v. Wade*,[1] held that the Fourteenth Amendment's Due Process Clause protects a right to abortion against unwarranted interference by the states.[2] The principle of *Roe* also applies against the federal government under the Fifth Amendment's Due Process Clause.[3]

Deeming the abortion right "fundamental," the *Roe* Court applied strict scrutiny. The Court divided pregnancy into three trimesters and held that during the first trimester, the Constitution forbids virtually all regulation of abortion.[4] During the second trimester, the Court held, the state has a compelling interest in enacting bona fide health regulations but may not prohibit abortion.[5] In the third trimester, after a fetus can survive outside the womb, the *Roe* Court found

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[*] Professor Michael C. Dorf is the Isidor and Seville Sulzbacher Professor of Law, Columbia Law School. This Article is based on a presentation given at the Practising Law Institute's Ninth Annual Supreme Court Review Program in New York, New York.

[1] 410 U.S. 113 (1973).

[2] *Id.* at 164; U.S. CONST. amend. XIV states, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[3] U.S. CONST. amend. V states, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

[4] *Roe*, 410 U.S. at 164.

[5] *Id.*

that the interest of the state in the developing fetus is sufficiently compelling to warrant a prohibition on abortion, so long as the law makes exceptions for abortions that are needed to preserve the life or health of the pregnant woman.[6]

In the following years, numerous decisions filled in the details overlooked by *Roe*. Some dealt with minors;[7] others addressed ostensible health regulations, that is, posed the question whether regulations justified on grounds of maternal health were in fact health regulations.[8] Despite repeated calls for the Court to overturn *Roe*, in *Planned Parenthood v. Casey*,[9] the Court, in a five-four decision, reaffirmed what the lead opinion called the "essential holding" of *Roe*—a state cannot prohibit pre-viability abortions.[10]

Casey essentially eliminated the distinction between the first and second trimesters. The controlling opinion adopted a somewhat less rigorous standard than the *Roe* Court had used for pre-viability abortion regulations.[11] Abortion, under the *Casey* test, could be regulated in the interest of informing women of the value the state places on fetal life, but the woman's ultimate choice could not be unduly burdened. An "undue burden" was defined in *Casey* as a regulation

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[6] *Id.* at 164-65.

[7] *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979). A minor's right to an abortion may be conditioned upon parental consent so long as the state provides an alternative proceeding which allows the minor to seek relief in court if she can demonstrate: "(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician . . . or (2) that . . . the desired abortion would be in her best interests." *Id.* at 643-44.

[8] *See, e.g.*, Simopoulos v. Virginia, 462 U.S. 506, 519 (1983) (upholding a Virginia statute that required all "second-trimester abortions be performed in licensed clinics" after a finding that the statute is reasonably intended for the protection of the woman's health).

[9] 505 U.S. 833 (1992).

[10] *Id.* at 846.

[11] *Id.* at 873, 876.

having "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion . . . ."[12]

With the ultimate legality of abortion settled for the time being, after *Casey* abortion opponents and others began to lobby legislatures to prohibit a procedure they called "partial-birth abortion." In this method of performing some second and third trimester abortions, a fetus is partially delivered while still alive, and then killed before delivery is complete.[13] Although all methods of abortion involve the deliberate destruction of a human fetus, groups that oppose "partial-birth" abortion consider this method especially horrific, presumably because it bears an uncomfortable resemblance to infanticide. States began passing laws restricting partial-birth abortion[14] and in 2000, one of these laws reached the United States Supreme Court in *Stenberg v. Carhart*.[15] There, in a five-four decision, the Court found that the Nebraska partial-birth abortion ban was unconstitutional as a violation of the principles of *Casey*.[16]

The Court rested its decision on two main grounds. First, the definition of a partial-birth abortion in the Nebraska statute was

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[12] *Id.* at 877.

[13] "Partial-birth abortion" usually refers to two similar procedures known as "dilation and evacuation" ("D & E") and "dilation and extraction" ("D & X"). *See* Stenberg v. Carhart, 530 U.S. 914, 927-28 (2000). In a D & E procedure, an intact fetus is delivered after the skull has been collapsed, either in the womb or after a partial delivery up to the head, depending on the position of the fetus in the womb. *Id.* at 927. In a D & X procedure, a living fetus is delivered feet first up to the head. The cranial contents are then evacuated and the delivery of the dead fetus is completed. *Id.* at 928.

[14] *See, e.g.*, FLA. STAT. ANN. § 390.0111 (West 2007); NEB. REV. STAT. § 28-328 (Supp. 2006), *invalidated by Stenberg v. Carhart*, 530 U.S. 914 (2000); OHIO REV. CODE ANN. § 2919.15.1 (LexisNexis 2006), *invalidated by* Women's Med. Prof'l Corp. v. Taft, 162 F. Supp. 2d 929 (S.D. Ohio 2001).

[15] *Stenberg*, 530 U.S. at 922.

[16] *Id.* at 929-30.

deemed unconstitutionally vague.[17] It was impossible to tell what was a permissible, as opposed to an impermissible, method of abortion. Second, the Nebraska law contained no health exception.[18] Even if a ban on a method of abortion only applies to post-viability abortions, which can be banned, there must be a health exception.[19] The *Casey* Court had clearly preserved that part of *Roe*, and so the Nebraska Act was held unconstitutional.[20]

There was an important development between *Casey* and *Stenberg*—the three-justice plurality from the *Casey* decision split. Justices O'Connor, Kennedy, and Souter jointly wrote the *Casey* decision. In *Stenberg*, Justices O'Connor and Souter joined Justice Breyer's opinion holding that the Nebraska Act was a violation of the *Casey* standard.[21] Justice Kennedy, however, dissented. According to his understanding of *Casey*, so long as the state did not completely ban abortion pre-viability, most regulations would be upheld.[22] Although the Nebraska law prohibited a method of abortion, other methods remained legal, and so in Justice Kennedy's view, it was valid.

Thereafter, Congress enacted the federal Partial-Birth Abortion Ban Act,[23] which was at issue in *Gonzales v. Carhart*.[24] The Federal Act differs from the Nebraska Act invalidated in *Stenberg* in

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[17] *Id.* at 942-43.
[18] *Id.* at 930, 937-38.
[19] *Id.* at 938.
[20] *Stenberg*, 530 U.S. at 929-30.
[21] *Id.* at 918-20, 929-30.
[22] *Id.* at 956-57 (Kennedy, J., dissenting).
[23] 18 U.S.C.A. § 1531 (West 2006 & Supp. 2007).
[24] 127 S. Ct. 1610 (2007).

one important respect: the Federal Act contains a clearer definition of what constitutes partial-birth abortion. It refers to anatomical landmarks of the delivered fetus beyond which one has a partial-birth abortion and before which one does not, so it provides greater notice to a doctor than did the Nebraska law.[25] That distinction is important in addressing the plaintiffs' vagueness objection but in one important respect the federal law mirrored the Nebraska law: it does not contain an exception for circumstances in which a partial-birth abortion is necessary for a pregnant woman's health.[26]

Prior to the decision in *Gonzales v. Carhart*, the principal uncertainty among observers was whether Justice Kennedy would stick to the principles he professed in his dissent in *Stenberg*[27] and therefore join Justices Scalia and Thomas[28] to form a new majority to overturn *Stenberg*—assuming, as most observers did, that Chief Justice Roberts and Justice Alito would also join the *Stenberg* dissenters. Given the importance of stare decisis in the *Casey* decision, however, it was also possible that Justice Kennedy would consider himself bound by the holding of the *Stenberg* majority.

Yet another possibility was that the Court might uphold the

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[25] The Federal Act defines "partial-birth abortion" as the deliberate and intentional delivery of a living fetus until "the entire fetal head is outside the body of the mother, or . . . any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus . . . ." 18 U.S.C.A. § 1531(b)(1)(A). The Nebraska Act, however, merely defined a partial-birth abortion as one "in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." NEB. REV. STAT. § 28-326 (Supp. 2006).

[26] *Gonzales*, 127 S. Ct. at 1637.

[27] *See generally Stenberg*, 530 U.S. at 956 (Kennedy, J., dissenting, joined by Rehnquist, C.J.) (noting the majority's "failure to accord any weight" to the state's interests).

[28] *Id.* at 980-1020 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.).

Federal Act by distinguishing, rather than overruling, *Stenberg*. The Solicitor General asked the Court to do just that, asserting, as the federal law itself does, that Congress has a greater fact-finding ability than does either a state legislature or a federal district court in a single case.[29] Even though the federal district judge in *Stenberg* found that the state ban did prohibit some medically necessary abortions, Congress, according to this argument is entitled to deference about such matters because of its ability to hold hearings, call witnesses and find legislative facts.[30] Accordingly, most well-informed observers expected that if the Court was going to uphold the federal ban it would either overrule *Stenberg* or distinguish it on the ground that Congress is entitled to deference.

I was one of a small number of law professors who wrote and submitted an amicus brief on our own behalf urging the Court to reject the "Congress gets deference" argument.[31] We conceded that, in general, Congress is entitled to a certain degree of fact-finding deference but, we contended, where the constitutional doctrine calls for heightened scrutiny of any sort, such deference is inappropriate. That, we argued, is the very meaning of heightened scrutiny. We thought if the Court accepted our argument, the Justices would have to bite the bullet—either strike down the federal law adhering to the Nebraska decision or overrule the Nebraska decision.

It turned out we were naive. The Court upheld the Federal

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[29] *Gonzales*, 127 S. Ct. at 1624.

[30] *Id.* at 1637.

[31] Brief of Constitutional Law Professors, David L. Faigman & Ashutosh A. Bhagwat, et al., as Amici Curiae in Support of Respondents, *Gonzales*, 127 S. Ct. 1610 (2006) (No. 05-380), 2006 WL 2345931.

Act but without overruling *Stenberg* and without officially accepting the argument that Congress is entitled to deference. In an opinion authored by Justice Kennedy, the Court first distinguished the federal statute from the Nebraska statute, finding the former clearer and thus not unconstitutionally vague.[32] That is fair enough. There were legitimate textual differences between the two laws.

What about the lack of a health exception? Curiously, the Court said that Congress is not entitled to any special deference.[33] In other words, the Justices accepted the argument that we made in our amicus brief. They did not overrule the Nebraska case, nor distinguish it on grounds of Congress's fact-finding ability. Yet they upheld the Federal Act.

How did the Court justify the conclusion that a state can ban a method of abortion that, in the testimony of the vast majority of medical experts, is the safest procedure in certain circumstances, without imposing an undue burden on the abortion right? With respect to post-viability abortions, the Justices said the question is whether an abortion is medically necessary for health reasons.[34] They alluded to an argument that Justice Kennedy made in his dissent in the Nebraska case—namely, that an abortion is not medically necessary simply because it is the safest method of abortion under the circumstances, so long as other safe methods exist, albeit ones that are not quite as safe.[35] That, however, was not the main argument of

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[32] *Gonzales*, 127 S. Ct. at 1628.
[33] *Id.* at 1637.
[34] *Id.* at 1635.
[35] *Id.* at 1636.

Justice Kennedy's opinion. The main argument was that in areas of medical uncertainty, the Court will accept the legislative judgment about what counts as medical necessity.[36]

There are three main problems with this claim. First, this reasoning is contrary to how the Court ruled in *Stenberg*.[37] Second, the decision to accept legislative judgment on medical matters is contrary to prior decisions, stretching back to *Roe* itself, that say that the decision whether to have a therapeutic abortion should be left to patients as guided by the professional medical judgment of their physicians.[38] Third, and most glaringly, is that there is no *actual* medical uncertainty. Congress had an extremely hard time finding any recognized expert to testify that there are no circumstances in which a so-called partial-birth abortion is medically necessary.[39] Congress could only find a small number of ideologically-driven doctors to say that the procedure is never necessary. And even those doctors did not quite say that.[40]

To make matters worse, there are factual findings in the Act itself that are demonstrably false. For instance, Congress found that "there are currently no medical schools that provide instruction in [partial-birth] abortions . . . ."[41] In fact, it *is* taught, as even the ma-

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[36] *Id.*

[37] *Stenberg*, 530 U.S. at 937-38.

[38] *Roe*, 410 U.S. at 163.

[39] In her testimony before Congress, Dr. Kathi Aultman testified that partial-birth abortion is never medially necessary. However, she did point out that the Act still retains an exception for when the woman's life is truly threatened. *Partial-Birth Abortion Ban Act of 2002: Hearing on H.R. 4965 Before the Subcomm. on the Const. of the Comm. on the Judiciary H.R.*, 107th Cong. 20 (2002) (testimony of Dr. Kathi Aultman, Chairman, Ob-Gyn department of Columbia-Orange Park Medical Center in Orange Park, Florida).

[40] *Id.*

[41] *See* Partial-Birth Abortion Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 § 2(14)(L).

jority acknowledged in its opinion.[42] Nonetheless, the Court said there is an issue of medical uncertainty to be resolved by Congress.[43]

Another problem for the law is the uncertainty concerning its purpose. The purpose cannot be health because even if you think that partial-birth abortion is never medically necessary, there was nothing resembling any evidence that partial-birth abortions are less safe than other methods. On the contrary, doctors *perform* abortions using this method *for* health reasons: to avoid generating bone fragments that could perforate the uterus and thus lead to dangerous bleeding or endanger future fertility.[44]

In *Casey*, the Court said that the state has a legitimate interest, from the very beginning of pregnancy, in communicating to a woman the moral and philosophical arguments against abortion.[45] That may be, but such communication cannot be the justification for the federal partial-birth abortion ban because it is not a law that says if you want to have a partial-birth abortion you have to read certain literature or you have to watch a video first. It actually bans the procedure. Thus, the government's interest cannot be an interest in informed choice.

The justification that Justice Kennedy identified, that I think the law's sponsors would identify, is a condemnation of the symbolic

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The Supreme Court noted that this portion of the Act is factually inaccurate. *See Gonzales*, 127 S. Ct. at 1637-38.

[42] *Gonzales*, 127 S. Ct. at 1638. Prior testimony provided the Court with evidence that this procedure was taught at Albert Einstein College of Medicine, and the Medical Schools of Columbia, Cornell, New York University, and Northwestern. *See* Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 490 (S.D.N.Y. 2004).

[43] *Gonzales*, 127 S. Ct. at 1636.

[44] *Id.* at 1645.

[45] *Casey*, 505 U.S. at 872. The Court notes that a state is permitted to enact regulations for the purpose of persuading the woman to continue her pregnancy. *Id.*

meaning of this procedure.[46] As the argument is sometimes put, in banning a procedure that looks uncomfortably like infanticide, Congress aimed to preserve the line between infanticide and abortion. In tacitly crediting this rationale, the *Gonzales* Court expanded the state's expressive interest in describing its moral opposition to abortion, which was set forth in *Casey*, to go so far as to warrant prohibitory legislation.[47]

The audience for partial-birth abortion bans, the audience for the expression of Congress's condemnation of this form of abortion, is not just individual women—in fact, it is primarily *not* women seeking abortions—but the population as a whole. For the first time since *Roe*, the Court in *Gonzales v. Carhart* upheld a regulation of pre-viability abortions not on grounds of maternal health or even fetal life, but on what are essentially symbolic grounds.

There is one small caveat that may place *Gonzales v. Carhart* in Professor Derrick Bell's category of cases about which people care a great deal but do not make any difference.[48] At the end of the opinion, Justice Kennedy left open the possibility that even though the Court was upholding the law as against a facial challenge, it might still allow a pre-enforcement as-applied challenge to the law's lack of

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[46] Justice Kennedy described how, during a partial-birth abortion, a doctor crushes the fetus's skull, not only to make it safer for the patient, but also so that the medical staff will not have to deal with a delivered fetus that has some viability and movement of the limbs. *See Gonzales*, 127 S. Ct. at 1623.

[47] *Id.* at 1634.

[48] Professor Derrick Albert Bell, Jr., a visiting professor at New York University School of Law and another panelist on the Supreme Court Review Program, expressed the view that many nominally important Supreme Court cases have only small effects in practice. For a fuller exploration of this claim, see DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

a health exception.[49] In other words, a woman might succeed in having the federal law invalidated as applied if she were to come to court saying, "I need one of these abortions and I am the rare someone for whom this type of abortion is really medically necessary."[50]

Nonetheless, the probability of success on such an as-applied challenge is small, principally because *Gonzales v. Carhart* itself was brought as both a facial and an as-applied challenge.[51] Plaintiffs in these cases are not stupid. When you write your complaint, you state: "We challenge the law on its face and as applied." This very case was a pre-enforcement as-applied challenge, albeit as applied to particular doctors, not as applied to any particular woman.

Accordingly, if what Justice Kennedy meant is that a doctor with standing to raise the third-party claims of her patients can still come into court to challenge the federal law as applied to her, then that exception swallows the holding of the case. However, if he only meant to allow a particular woman to come into court claiming that she herself has a medical need for the banned procedure, then that right is likely to be useless because the pace of litigation will make it very hard for her to obtain relief in time to have the abortion.

I shall close with two final observations about the case. First, it is striking to read the rhetoric of this opinion in contrast with the rhetoric of *Casey*. *Casey* has very strongly libertarian rhetoric and

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[49] *Gonzales*, 127 S. Ct. at 1639.

[50] *Id.* ("It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop.").

[51] Complaint at 2-3, Carhart v. Ashcroft, 331 F. Supp. 2d 805 (D. Neb. 2003) (No. 4 Civ. 3385).

credits women with making responsible choices.[52] This case, however, adopts the rhetoric of the pro-life movement. It talks about "the abortion doctors" rather than obstetricians.[53] It talks about "the baby" and "the unborn child."[54]

Second, there is a very strange argument made in the case which seems to credit a claim that sometimes goes under the name of Post-Abortion Trauma Syndrome. According to this claim, women who have abortions frequently come to regret it and are traumatized by it.[55] Justice Kennedy's majority opinion says that while there is no evidence of this phenomenon, it nonetheless must surely exist.[56] Yet he does not explain why, even if the syndrome is real, it would justify a ban rather than a strong requirement that women give informed consent to the procedure. This provocative non sequitur may well have been meant to address future cases.

With the changes in the Court's personnel since the Court decided *Stenberg* in 2000, Justice Kennedy now controls the meaning of *Casey*, and thus the meaning of the constitutional right to abortion. As *Gonzales v. Carhart* shows, he does not intend to be shy about upsetting conventional expectations about the scope and limits of that right.

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[52] *See Casey*, 505 U.S. at 852-53.

[53] *See, e.g., Gonzales*, 127 S. Ct. at 1614, 1622, 1625.

[54] *See Gonzales*, 127 S. Ct. at 1620, 1622-23.

[55] The Court notes that unless doctors are forced to explain the facts and consequences of the abortion, they will shield their patients from the gruesome details of the partial-birth abortion, and thus the patient's decision to commence the procedure might eventually lead to Post-Abortion Trauma Syndrome. *See Gonzales*, 127 S. Ct. at 1634.

[56] *Id.*